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IN THE
COURT OF APPEALS OF INDIANA

BRENT BESSER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 34A02-0705-CR-419
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HOWARD CIRCUIT COURT
The Honorable Lynn Murray, Judge
Cause No. 34C01-0608-FC-184

October 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issues

Following a guilty plea, Brent Besser appeals his sentence for robbery, a Class C felony. Besser raises two issues, which we restate as whether the trial court abused its discretion in sentencing Besser and whether Besser's eight-year sentence is inappropriate given the nature of the offense and his character. Concluding that any abuse of discretion was harmless and that Besser's sentence is not inappropriate, we affirm.

Facts and Procedural History

On August 2, 2006, Besser entered First Farmers Bank and Trust in Kokomo, Indiana, and yelled for everyone to get down on the ground. Besser jumped over the counter, removed cash from the teller drawers, and left the bank. Besser became the object of police attention after using dye-stained bills to purchase a money order. After obtaining a search warrant, police searched Besser's apartment and found twenty-four bills with the same serial numbers as bills taken from the bank.

On August 4, 2006, the State charged Besser with robbery, a Class C felony. On September 14, 2006, the State filed an information alleging that Besser was an habitual offender. On December 20, 2006, the State and Besser filed a Recommendation of Plea Agreement, under which Besser agreed to plead guilty to robbery, and the State agreed to dismiss the habitual offender count. Under this agreement, Besser was to be sentenced to eight years with two years suspended to probation. On January 24, 2007, the State and Besser filed an amended agreement, which left sentencing to the discretion of the trial court. On February 21, 2007, the trial court accepted this amended agreement and held a sentencing

hearing. The trial court's sentencing order contains the following discussion of aggravating and mitigating circumstances:

> The Court considers as a mitigating circumstance that the Defendant has pled guilty, said plea in consideration of the State's dismissal of the Petition for Sentencing for Habitual Felony Offender.
> The Court considers and finds as an aggravating circumstance that the defendant had been adjudicated a delinquent for committing the offense of robbery in 1986, and as an adult, the defendant has convictions for the felony offenses of robbery in 1987, arson in 1989, and three (3) counts of robbery in 1997. Prior attempts to rehabilitate the defendant including incarceration, probation, and substance abuse treatment have failed to dissuade the defendant from committing this offense of robbery, said offense committed only eight (8) months after the defendant's release from incarceration for having committed prior robbery offenses.
> The Court finds that the aggravating circumstances outweigh the mitigating circumstance, justifying the imposition of an aggravated sentence for the offense.
> The Court having considered the aggravating and mitigating circumstances cited above, the nature and circumstances of the offense, the criminal history of the Defendant, the risk of such an offense recurring, finds that the Defendant should be and is hereby sentenced to the Indiana Department of Corrections for a period of eight (8) years.

Appellant's Appendix at 74-75. Besser now appeals.

Discussion and Decision

I. Whether the Trial Court Abused Its Discretion In Sentencing Besser

A. Standard of Review

A trial court may impose any sentence authorized by statute and permissible under the Indiana Constitution "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." Ind. Code § 35-38-1-7.1(d). However, trial courts are still required to issue a sentencing statement whenever sentencing a defendant for a felony. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007). We will review a trial court's

sentencing decision for an abuse of discretion, which occurs when the trial court's decision is "clearly against the logic and effect of the facts and circumstances before the court, or the reasonable, probable, and actual deductions to be drawn therefrom." Id. (quoting K.S. v. State, 849 N.E.2d 538, 544 (Ind. 2006)). A trial court may abuse its discretion by finding aggravating circumstances unsupported by the record, omitting reasons "that are clearly supported by the record and advanced for consideration," or by noting reasons that are improper considerations as a matter of law. Id. However, the trial court no longer can be said to have abused its discretion by improperly weighing the aggravating and mitigating circumstances. Id.

If we find an error related to the trial court's sentencing statement, "we have the option to remand to the trial court for a clarification or new sentencing determination, to affirm the sentence if the error is harmless, or to reweigh the proper aggravating and mitigating circumstances independently at the appellate level." Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Additionally, we may exercise our authority under Indiana Appellate Rule 7(B) to review the sentence to determine if it is inappropriate given the nature of the offense and the character of the offender. See Windhorst v. State, 868 N.E.2d 504, 507 (Ind. 2007); Ruiz v. State, 818 N.E.2d 927, 929 (Ind. 2004).

B. Aggravating Circumstances

1. Failure of Prior Attempts at Rehabilitation and Risk to Re-Offend

Besser first argues that the trial court's comments regarding failed attempts to rehabilitate Besser and the risk that Besser would commit future crimes violated our supreme

court's opinion in Morgan v. State, 829 N.E.2d 12 (Ind. 2005). We disagree.

Morgan involved a challenge based on Blakely v. Washington, 542 U.S. 296 (2004), which held that any fact (with certain exceptions) used to increase a defendant's maximum sentence must either be found by a jury or admitted by the defendant. The defendant in Morgan argued the judge's finding that prior punishments had failed to rehabilitate her violated Blakely. Our supreme court disagreed, holding "that such statements, which our Court of Appeals has called 'derivative' of criminal history, are legitimate observations about the weight to be given to facts appropriately noted by a judge alone under Blakely. They cannot serve as separate aggravating circumstances." 829 N.E.2d at 17. Our supreme court went on to hold that the trial court properly noted the failure of previous attempts to rehabilitate as "a conclusion about the weight of the [other aggravating circumstances]." Id. at 18.

Based on Morgan, Besser argues the trial court's conclusions regarding previous attempts at rehabilitation and Besser's risk to re-offend were improper. We fail to see how Morgan, which holds a trial court's comment about failed attempts at rehabilitation was proper compels this result. On the contrary, as in Morgan, the trial court's comments can be viewed as proper comments on the weight of Besser's criminal history.

Although not necessary to our decision, we note that Morgan was decided in the context of a Blakely challenge, and upheld the propriety of the trial court's comments based on the fact that the failure to rehabilitate comment was "1) supported by facts otherwise admitted or found by a jury and 2) meant as a concise description of what the underlying

facts demonstrate and therefore relies upon a legal determination otherwise reserved as a power of the judge." Morgan, 829 N.E.2d at 18. In that sense, Morgan is clearly distinguishable from cases involving the advisory sentencing scheme, under which the finding of aggravating circumstances not admitted by the defendant does not violate Blakely. See McMahon v. State, 856 N.E.2d 743, 751 n.8 (Ind. Ct. App. 2006); Burgess v. State, 854 N.E.2d 35, 40 n.5 (Ind. Ct. App. 2006).

Indeed, it appears that under the advisory sentencing scheme, a trial court may properly consider a defendant's risk to re-offend or previous failed attempts at rehabilitation as separate aggravators. See McMahon, 856 N.E.2d at 751 n.8; cf. Georgopulos v. State, 735 N.E.2d 1138, 1144 (Ind. 2000) (holding trial court properly considered risk to re-offend as a separate aggravating circumstance under previous version of Indiana Code section 35-38-1-7.1, which identified this aggravating factor); Allen v. State, 720 N.E.2d 707, 715 (Ind. 1999) (in case decided before Blakely, our supreme court affirmed the defendant's sentence, noting that the trial court found multiple aggravating circumstances, including failed attempts at rehabilitation); Luhrsen v. State, 864 N.E.2d 452, 457-58 (Ind. Ct. App. 2007), trans. denied (where trial court found several aggravating circumstances, including defendant's risk to re-offend, each of the aggravators was sufficient to warrant consecutive sentences); Foster v. State, 795 N.E.2d 1078, 1090-91 (Ind. Ct. App. 2003), trans. denied (in case decided before Blakely, this court held that the trial court properly considered defendant's failed attempts at rehabilitation).

Regardless of whether a trial court may find failed attempts at rehabilitation or a risk

to re-offend as separate aggravating circumstances, comments regarding these circumstances are proper explanations as to the weight of a defendant's criminal history. We conclude the trial court's comments in this case were not improper.

2. Nature and Circumstances of the Offense

Besser argues that the trial court's statement regarding the nature and circumstances of the crime was improper, as the trial court failed to point to any specific aspects of the crime it was considering. In order to find the nature and circumstances of a crime to be an aggravating circumstance, the trial court must point to facts not necessary to establish the elements of the offense. See McCoy v. State, 856 N.E.2d 1259, 1263 (Ind. Ct. App. 2006). The trial court's sentencing order stated it was considering, "the aggravating and mitigating circumstances cited above, the nature and circumstances of the offense, the criminal history of the Defendant, the risk of such an offense recurring . . . ." Appellant's App. at 75. We recognize that this statement is not a model of clarity. This statement could be interpreted as meaning that the trial court considered four separate factors: (1) the aggravators and mitigators cited above; (2) the nature and circumstances of the offense; (3) criminal history; and (4) risk of re-offending. We recognize that this interpretation would result in the order containing surplusage, as the trial court's statement above indicated that it was considering Besser's criminal history as an aggravating circumstance, and implied as much about his risk of re-offending. Under this interpretation, the trial court did not abuse its discretion, as it considered the nature and circumstances of the crime, but did not find them to be an aggravating circumstance.

The statement could also be interpreted as meaning that the nature and circumstances, criminal history, and risk of re-offending were the aggravating and mitigating circumstances considered above. This interpretation would result in the trial court's recitation being an incomplete statement, as the trial court found circumstances in addition to those recited—namely, Besser's guilty plea and the failed attempts at rehabilitation. Under this interpretation, the nature and circumstances aggravator would be improper, as the trial court failed to explain what about the crime made it an aggravating circumstance in and of itself. See Bonds v. State, 729 N.E.2d 1002, 1005 (Ind. 2000) (noting that when using the nature and circumstances aggravator, "a trial court should specify why a defendant deserves an enhanced sentence under the particular circumstances").

The trial court's sentencing statement does not clearly indicate whether or not it abused its discretion. If the trial court merely considered the nature and circumstances of the crime without finding them to be an aggravating circumstance, the trial court acted within its discretion. If the trial court improperly found the nature and circumstances of the crime to be an aggravating circumstance without explaining what aspect of the crime was aggravating, it abused its discretion. We will address the effect of this possible error below.

C. Mitigating Circumstances

We will conclude a trial court abused its discretion by failing to find a mitigating circumstance if the defendant establishes "that the mitigating evidence is both significant and clearly supported by the record." Anglemyer, 868 N.E.2d at 493. Also, the circumstance must have been advanced for consideration at the sentencing hearing. Id. at 491.

1. Remorse

Besser argues that the trial court improperly failed to find Besser's remorse to be a significant mitigating circumstance. Although a defendant's remorse may serve as a valid mitigating circumstance, "[i]t is within the sentencing court's discretion to determine whether remorse should be considered as a 'significant' mitigating factor." Evans v. State, 727 N.E.2d 1072, 1083 (Ind. 2000). "[W]ithout evidence of some impermissible consideration by the trial court, a reviewing court will accept its determination as to remorse." Stout v. State, 834 N.E.2d 707, 711 (Ind. Ct. App. 2005), trans. denied.

Here, the trial court's statement at the sentencing hearing indicates that it found Besser "appearing to be remorseful." Sentencing Transcript at 21. However, the trial court did not find Besser's remorse to be a significant mitigating circumstance. This decision was within the trial court's discretion. O'Neil v. State, 719 N.E.2d 1243, 1244 (Ind. 1999) (trial court did not abuse its discretion in declining to find remorse to be a mitigating factor after discussing defendant's remorse at the sentencing hearing); see Anglemyer, 868 N.E.2d at 493 (recognizing that the trial court did not overlook the defendant's mental illness, but merely determined that it was not a significant mitigating circumstance).

2. Guilty Plea

The trial court found Besser's guilty plea to be a mitigating circumstance, but Besser argues that the trial court improperly considered that the State dropped the habitual offender count as part of Besser's plea agreement. We disagree. The law is clear that where a defendant has already received a benefit in exchange for a guilty plea, the mitigating weight

of the plea may be reduced.[1] See Sensback v. State, 720 N.E.2d 1160, 1165 (Ind. 1999); Wells v. State, 836 N.E.2d 475, 479 (Ind. Ct. App. 2005), trans. denied. We decline Besser's invitation to revisit this well-established principle.

D. Effect of Possible Abuse of Discretion

As discussed above, the trial court may have abused its discretion by finding an improper aggravating circumstance. However, we conclude that even if the trial court improperly found the nature and circumstances of the crime to be an aggravating circumstance, such error was harmless, as it had already stated that the aggravating circumstances of Besser's criminal history, the failed attempts of rehabilitation, and Besser's risk to re-offend outweighed the mitigating circumstance of Besser's guilty plea. See McCann v. State, 749 N.E.2d 1116, 1120 (Ind. 2001) (even if trial court improperly found the nature and circumstances of the crime to be an aggravating circumstance, sentence was still proper in light of additional proper aggravating circumstances). Also, the trial court's statement at the sentencing hearing included a lengthy discussion of Besser's significant criminal history, the proximity of his release from prison to the commission of the current offense, and the chance that Besser might commit another robbery. On the other hand, the trial court did not discuss the facts of the instant offense when pronouncing Besser's

[1] Besser's reliance on Hunter v. State, 854 N.E.2d 342 (Ind. 2006), is wholly misplaced. Hunter involved a Blakely challenge to the trial court's use of prior dismissed charges as part of the aggravating circumstance of the defendant's criminal history. To the extent that Besser is attempting to argue that the trial court's consideration of the dismissed charge violated Blakely, under the current advisory sentencing scheme, the trial court's consideration of facts not admitted by the defendant does not violate the Sixth Amendment. See United States v. Booker, 543 U.S. 220, 234 (2005). Second, the consideration of this dismissed charge would have been proper even under Blakely, as the dismissed charge was not used to "increase the penalty for

sentence. Based on the facts of this case, we conclude that any error in the trial court finding the nature and circumstances of the crime to be an aggravating circumstance was harmless, as this factor clearly had minimal impact on the trial court's sentencing decision.

II. Appropriateness of Besser's Sentence

A. Standard of Review

When reviewing a sentence imposed by the trial court, we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). We have authority to "revise sentences when certain broad conditions are satisfied." Neale v. State, 826 N.E.2d 635, 639 (Ind. 2005). We must examine both the nature of the offense and the defendant's character. See Payton v. State, 818 N.E.2d 493, 498 (Ind. Ct. App. 2004), trans. denied. When conducting this inquiry, we may look to any factors appearing in the record. Roney v. State, 872 N.E.2d 192, 206 (Ind. Ct. App. 2007).

B. Nature of the Offense and Character of the Offender

We recognize that the trial court sentenced Basser to the maximum sentence for a Class C felony, see Ind. Code § 35-50-2-6(a), and that maximum sentences should generally be reserved for the worst offenses and offenders, see Bacher v. State, 686 N.E.2d 791, 802 (Ind. 1997). However, as we have explained,

> If we were to take this language literally, we would reserve the maximum

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a crime beyond the prescribed statutory maximum," Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), but to reduce the mitigating effect of the guilty plea.

> punishment for only the single most heinous offense. . . . We should concentrate less on comparing the facts of this case to others, whether real or hypothetical, and more on focusing on the nature, extent, and depravity of the offense for which the defendant is being sentenced, and what it reveals about the defendant's character.

Brown v. State, 760 N.E.2d 243, 247 (Ind. Ct. App. 2002), trans. denied.

We have little information regarding the specifics of Besser's offense, and Besser has made no argument regarding the nature of the offense in his appellate brief. The State acknowledges that nothing about the nature of Besser's robbery warrants the maximum sentence. We point out that Besser's act of robbery put several people in fear, as he robbed a bank, and that robbery requires only a single victim. See Ind. Code § 35-42-5-1. To that extent, Besser caused more harm than was necessary to satisfy the elements of the offense. See Ind. Code § 35-38-1-7.1(a)(1). However, we also note that it appears Besser did not use force to commit this robbery, and merely threatened the use of force.

In regard to Besser's character, Besser's criminal history consists of felony convictions of robbery, a Class C felony, arson, a Class B felony, and three counts of robbery, a Second-Degree Felony[2]; misdemeanor convictions of driving under the influence, possession of paraphernalia, four counts of public intoxication, driving while suspended, theft, domestic violence battery, resisting law enforcement, battery on a police officer, intimidation, two counts of writing a worthless check, and criminal mischief; and a juvenile

[2] These convictions are from Florida. In Florida, robbery is a second-degree felony when it is committed without a weapon. Fla. Stat. § 812.13(b). A second-degree felony in Florida is punishable by up to fifteen years. Fla. Stat. § 775.082(c).

adjudication for robbery.[3] Besser was released from a Florida penitentiary, where he served his sentence for second-degree robbery, in January 2006, roughly eight months before he committed the instant offense. It also appears that Besser has violated probation at least three times.

Besser's criminal history is very significant because of its length and the relation of many of the offenses to the current offense. See Prickett v. State, 856 N.E.2d 1203, 1209 (Ind. 2006). Indeed, Besser has four previous felony convictions and one juvenile adjudication for robbery, clearly indicating that with respect to the crime of robbery, Besser is among the worst offenders. See Ashba v. State, 816 N.E.2d 862, 867-68 (Ind. Ct. App. 2004). Also, the short time between Besser's release from prison and his commission of the current offense comments negatively on his character. See Cardwell v. State, 666 N.E.2d 420, 423 (Ind. Ct. App. 1996), trans. denied. Besser's probation violations further demonstrate his lack of respect for the criminal justice system. See Jones v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), trans. denied.

We recognize that Besser pled guilty and, to some extent, demonstrated remorse for his actions. However, as the trial court noted, the effect of his guilty plea is tempered by the fact that he received a significant benefit in return. See Fields v. State, 852 N.E.2d 1030, 1034 (Ind. Ct. App. 2006), trans. denied (noting that the defendant "received a significant benefit from the plea, and therefore it does not reflect as favorably upon his character as it

might otherwise"). Further, as the trial court did not find Besser's remorse to be a significant mitigating factor, we do not consider it relatively important when considering Besser's character in light of his consistent demonstration of lack of respect for others and the law.

Based on Besser's character, as evidenced by his substantial, related, and proximate criminal history, we conclude that an eight-year sentence for robbery is not inappropriate.

Conclusion

We conclude that any abuse of discretion committed by the trial court in finding the aggravating and mitigating circumstances was harmless, and that Besser's sentence is not inappropriate given the nature of the offense and his character.

Affirmed.

KIRSCH, J., and BARNES, J., concur.

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[3] See Altes v. State, 822 N.E.2d 1116, 1125 (Ind. Ct. App. 2005), trans. denied ("[A] trial court's assessment of a defendant's future criminal behavior can properly be based upon the defendant's adult or juvenile criminal history.").